

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

BERNATELLO'S PIZZA, INC.,

Plaintiff,

v.

Case No: 16-cv-65

HANSEN FOODS, LLC,

Defendant.

DECLARATION OF CHAD D. SCHULTZ

I, Chad D. Schultz, declare as follows:

1. I am the Vice President of Sales & Marketing for Bernatello's Pizza, Inc. ("Bernatello's"). I make this declaration based upon my personal knowledge and in support of Bernatello's Memorandum in Support of its Motion for Preliminary Injunction.

2. Bernatello's is a Minnesota corporation with its corporate headquarters at 5625 West 78th Street, Suite B, Edina, Minnesota, 55439. Bernatello's is a family owned and operated business that manufactures and distributes frozen pizza brands.

3. I have worked as Vice President of Sales & Marketing at Bernatello's for 15 years and 6 months. In that role I am familiar with all aspects of Bernatello's business including its manufacturing, distribution, production, finances, marketing, advertising, and sales.

4. As Vice President of Sales & Marketing, I develop and implement company sales and marketing strategies, monitor and analyze sales activities, manage sales and marketing budgets, develop and manage client accounts, supervise development of marketing and sales materials and promotions, and research new project development, among other responsibilities.

5. Bernatello's is in the business of producing and selling frozen pizza products to grocery stores, convenience stores, taverns, schools, club stores, food service providers,

fundraising organizations, and other locations/channels throughout Wisconsin, the Midwest and its other geographic markets.

6. Bernatello's has been manufacturing pizza since 1982. Bernatello's has two manufacturing facilities in Maple Lake, Minnesota and Kaukauna, Wisconsin which together produced over 36,000,000 pizzas in 2015.

7. Bernatello's manufactures frozen pizzas under its own brands including: BREW PUB, BELLATORIA, ORV'S, and ROMA. These brands target different consumer groups within the frozen pizza marketplace by nature of their price point, quality and quantity of ingredients, and packaging.

8. Bernatello's produces its BREW PUB pizza with a label having separately distinguishable BREW aspects, i.e. BREW PUB, and/or BREW PUB PIZZA, and/or BREW PUB PIZZA and Design.

9. Bernatello's owns federal trademark registrations and applications pertaining to the "BREW PUB" pizza it produces, including at least the following: BREW PUB PIZZA (U.S. Registration No. 4,373,576), BREW PUB PIZZA and Design (U.S. Registration No. 4,431,990), BREW PUB (Application Serial No. 86/978,114), IT'S BREW TIME (Application Serial No. 86/870,938), and BREW (Application Serial No. 86/838,514) ("BREW trademarks"). Attached hereto as **Exhibit A** is a true and correct copy of the aforementioned trademark registrations and applications.

10. The BREW trademarks, or some of them, have been used exclusively and continuously throughout the Midwest region of the United States and Bernatello's other geographic markets from at least as early as October 23, 2012.

11. Bernatello's BREW PUB frozen pizzas are widely accessible and relatively

inexpensive for consumers to obtain in the upper Midwest and in Bernatello's other markets.

12. Since frozen pizzas are relatively inexpensive products frequently purchased by consumers without detailed scrutiny of the goods and their brands, an average consumer of frozen pizza is typically an "impulse buyer."

13. There are different category segments or "tiers" of pizza organized by price points and quality of pizzas that range from more affordable to super-premium.

14. The following is a table of the Frozen Pizza Category Segments with representative examples of brands and price ranges:

Segment	Average Retail	Bernatello's Pizza, Inc. Brands	Competitive Brands
Price/Value	Less Than \$2.00	Roma	Palermo's Classics, Totino's, Tony's
Value	\$2.00-\$3.00	Orv's Tasty Toppings	Jacks
Main Stream	\$3.00-\$5.00	Orv's Rizers	Tombstone, Palermo Primo, Red Baron
Premium	\$5.00-\$6.00	Bellatoria/Connie's Naturals (Partner Brand)	DiGiorno, California Pizza Kitchen, Freshchetta
Super Premium	\$6.00 +	BREW PUB Lotzza Motzza	Pizza Corner-North Dakota, Heggie's-Minnesota, Screamin' Sicilian

15. The upper Midwest is considered the "Pizza Belt" for frozen pizza. Two of the largest frozen pizza consumption markets, with higher household penetration, are Minneapolis/St. Paul at \$86M annually, and Milwaukee at \$55M annually.

16. In the past, frozen pizza has not had the brand loyalty that national companies like Nestle and Schwan's would like to achieve. The frozen pizza category is highly promotionally driven, and consumers tend to migrate between brands that are on sale.

17. At least as early as 2012, I and others at Bernatello's felt that consumers believed frozen pizzas were inferior to restaurant or freshly-made pizzas. This was confirmed later by the Mintel Report noted below.

18. As stated by the Mintel Report (a widely recognized market report on the pizza industry), "flat sales are forecast for the U.S. market for store bought pizza between 2014 and 2019, as more consumers recover their spending power due to the slowly reviving economy and spend on restaurant pizza rather than frozen pizza. A majority of consumers feel that store-bought pizza is not as good as restaurant pizza, which means store-bought brands must do more to bring their product quality closer to that of restaurants to compete with pizzeria". Attached as **Exhibit B** is a true and correct copy of Mintel's 2014 Report.

19. In October 2012, Bernatello's launched a new variety of frozen pizza branded as BREW PUB. This brand was designed with unique ingredients and packaging distinct from its competitors to target consumers in the marketplace for a "super-premium" frozen pizza. The retail price of the BREW PUB pizza ranges from \$10.99 regular price to \$5.99 on hot promotion.

20. Bernatello's objective in developing BREW PUB frozen pizzas in 2012 was to produce and launch a super-premium brand that would "raise the bar" on the quality of frozen pizza. Bernatello's wanted to develop a "WOW" brand of frozen pizza that would compete with restaurant quality. The initial brand ideation was to communicate a place in the consumer's mind: a pleasant and relaxed locale and experience. What resulted was BREW PUB frozen pizzas with the tag line "The Ingredients For A Great Time!"

21. Bernatello's goal was to develop BREW PUB as the "craft pizza" of frozen pizza, much like the beer industry, and establish a high level of brand loyalty.

22. Bernatello's marketing team established unique product characteristics related to

product quality and packaging to position BREW PUB as a super-premium “WOW” frozen pizza product and differentiate BREW PUB from other frozen pizza varieties.

23. The following features related to BREW PUB’s product quality were developed and adopted to differentiate BREW PUB frozen pizza from other frozen pizzas in the market:

- Over ½ lb. of Real Premium Wisconsin Cheese
- Wide, long, and thickly shredded cheese for a premium look
- Cheese placed on top of toppings to give consumers a visual affirmation of quality and quantity of ingredients
- Generous servings of premium ingredients including:
 - Premium large sausage nuggets
 - Premium sliced, dark colored mushrooms
 - Premium roasted vegetable strips, not diced
- Sheeted thin crust with large quantities of toppings

24. Additional features related to BREW PUB’s packaging were developed and adopted to differentiate BREW PUB frozen pizza from other frozen pizzas in the market. Each BREW PUB pizza is sealed in clear wrap with a small, circular label on the top center of the pizza (i.e., “bullseye” packaging). This packaging provides consumers with a visual on the quality and quantity of BREW PUB’s ingredients. In addition, this packaging was designed to give BREW PUB frozen pizzas a homemade Tavern-style look targeting a “craft pizza” look. This packaging also differentiated BREW PUB from other National brands that carton (that is, box) premium and super-premium brand frozen pizzas. Attached as **Exhibit C** is a true and correct copy of a BREW PUB pizza label and packaging.

25. In one aspect BREW PUB pizza also includes a design of a keg tap on the pizza label to further the “craft pizza” and “tavern” associations.

26. Bernatello’s BREW PUB frozen pizza is also unique and distinct from other frozen pizza varieties because it is, or was until very recently, the only frozen pizza on the market utilizing the term BREW in its label or brand name.

27. BREW PUB pizzas are manufactured in 12 varieties in the multi-serve line and 5 varieties in a single serve line, all of which include premium toppings to complement the high quality Wisconsin cheese. These ingredients were selected through an internal test panel.

28. In helping to establish and grow Bernatello's reputation and presence in the frozen pizza industry, I have been heavily involved in Bernatello's advertising and marketing strategies.

29. Bernatello's undertakes extensive efforts and significant spending in the advertising and marketing of its BREW PUB brand, including efforts and dollars spent for creation and purchase of advertisements, event sponsorships, in-store promotions, and other marketing efforts. Attached as **Exhibit D** are true and correct copies of Bernatello's BREW PUB Events and Sponsorship Lists for 2014-2015 and photographs providing representative samples of Bernatello's BREW PUB advertisements.

30. One specific advertising and marketing effort unique to BREW PUB in the super-premium market has been the use of a trailer marked with BREW PUB's brand to cook and serve BREW PUB pizza at various locations and events. Attached as **Exhibit E** is a true and correct copy of a photograph of a BREW PUB branded trailer.

31. Beginning in 2012 and through December 31, 2015, Bernatello's has spent a total of \$3,920,486 on advertising and marketing of the BREW PUB brand.

32. Over the last 3.25 years, Bernatello's has spent the following amounts on advertising and marketing the BREW PUB brand annually:

- \$45,559 in 2012
- \$1,303,031 in 2013
- \$1,181,532 in 2014

- \$1,390,364 in 2015

33. I continuously monitor and analyze the results of Bernatello's advertising and marketing strategies. Based on those results, as well as Bernatello's sales figures, I have seen the BREW PUB brand grow in recognition and association among frozen pizza consumers. Attached as **Exhibit F** are true and correct copies of consumer's posts to Bernatello's social media accounts.

34. Due to the over 3.9 million dollars Bernatello's has spent on marketing and advertising, the growing presence of BREW PUB in the marketplace, and ever-increasing sales figures, Bernatello's has established a strong association in the frozen pizza market between the term BREW and Bernatello's BREW PUB pizza.

35. Bernatello's has directed extensive advertising and marketing strategies to make these BREW trademarks well known and recognized throughout the Midwest and Bernatello's other geographic markets as connected to Bernatello's BREW PUB pizza. In addition, Bernatello's has sold millions of BREW PUB pizzas under the BREW trademarks as reflected in the below figures.

36. Since Bernatello's BREW PUB pizza entered the marketplace in October 2012, its sales have steadily increased each year, as follows:

Year End	Quantity	Sales
2013	2.4M	\$12.8M
2014	4.8M	\$24.6M
2015	7.8M	\$39.8M

37. Bernatello's primary means of distribution is with its own Direct Store Delivery ("DSD") system. The DSD system consists of 52 routes/trucks and a sales team of 112. This

DSD system distributes primarily to grocery stores in Wisconsin, Minnesota, the Upper Peninsula of Michigan, Iowa, North and South Dakota. Bernatello's pizzas are sold in over 2,100 DSD locations.

38. Bernatello's also utilizes distributors such as Trimart, U.S. Foods, Holiday Wholesale, Power Play, Englehart, Upper Lakes, and Barnes, among others, that operate in and around Bernatello's current DSD System. These distributors focus primarily on small format business (convenience stores, taverns, restaurants, and hotels, among others), and also fulfill distribution to grocery stores at the outer boundaries of the Bernatello's DSD system. In addition, the BELLATORIA and BREW PUB brands are located in select regions throughout the United States through direct warehouse programs and club stores. With additional distributor and direct warehouse programs there are over 1,500 estimated additional locations covered.

39. As a frozen pizza manufacturer and distributor in the Midwest region, Bernatello's directly competes with other frozen pizza manufacturers and distributors in Wisconsin, Minnesota, Iowa, North Dakota, South Dakota, and Michigan. As such, Bernatello's business is dependent upon establishing and maintaining a customer base.

40. Based on AC Nielsen, a global marketing research firm, Bernatello's is the first or second largest supplier of frozen pizza in the Minnesota and Wisconsin markets. Attached as **Exhibit G** are true and correct copies of AC Nielsen's dollar market shares by company for the frozen pizza market.

41. From September 2014 to September 2015, Bernatello's BREW PUB pizza ranked first among all frozen pizza brands in the Minneapolis, Minnesota market selling 2,543,052 units totaling \$13,992,719 in sales. Attached hereto as **Exhibit H** is a true and correct copy of AC Nielsen's Brand Rank Report for Frozen Pizza in Minneapolis for 52 weeks ending September

26, 2015.

42. From September 2014 to September 2015, Bernatello's BREW PUB pizza ranked second among all frozen pizza brands in the Milwaukee, Wisconsin market selling 849,653 units totaling \$5,044,560 in sales. Attached hereto as **Exhibit I** is a true and correct copy of AC Nielsen's Brand Rank Report for Frozen Pizza in Milwaukee for 52 weeks ending September 26, 2015.

43. From September 2014 to September 2015, Bernatello's BREW PUB pizza ranked first among all frozen pizza brands sold in Lunds & Byerlys grocery store selling 240,975 units totaling \$1,273,068 in sales. Attached hereto as **Exhibit J** is a true and correct copy of AC Nielsen's Brand Rank Report for Frozen Pizza in Lunds & Byerlys for 52 weeks ending September 26, 2015.

44. From September 2014 to September 2015, Bernatello's BREW PUB pizza ranked fourth among all frozen pizza brands sold in the Roundy's Supermarkets selling 400,612 units totaling \$2,489,206 in sales. Attached hereto as **Exhibit K** is a true and correct copy of AC Nielsen's Brand Rank Report for Frozen Pizza in Roundy's for 52 weeks ending September 26, 2015.

45. From September 2014 to September 2015, Bernatello's BREW PUB pizza ranked first among all frozen pizza brands sold in Cub Foods selling 1,359,747 units totaling \$7,214,386 in sales. Attached hereto as **Exhibit L** is a true and correct copy of AC Nielsen's Brand Rank Report for Frozen Pizza in Cub for 52 weeks ending September 26, 2015.

46. From September 2014 to September 2015, Bernatello's BREW PUB pizza ranked second among all frozen pizza brands sold in Piggly Wiggly grocery store selling 481,221 units totaling \$3,149,369 in sales. Attached hereto as **Exhibit M** is a true and correct copy of AC

Nielsen's Brand Rank Report for Frozen Pizza in Piggly Wiggly for 52 weeks ending September 26, 2015.

47. Hansen Foods, LLC ("Hansen") is a Wisconsin LLC with its principal place of business located at 930 Goddard Way, Green Bay, Wisconsin 54311. Hansen is one of Bernatello's competitors that manufactures frozen pizza for distribution in the Midwest region. Hansen has manufactured the BIG BEN brand of frozen pizza for several years. BIG BEN is, or was, in the super-premium category. I understand Hansen is discontinuing BIG BEN frozen pizza.

48. BIG BEN was a poor performer in the frozen pizza market. BIG BEN never achieved significant market share and was losing shelf space. Attached as **Exhibit N** is a true and correct copy of a compilation of data from the AC Nielsen's Brand Rank Report for BIG BEN Frozen Pizza in Milwaukee for 52 weeks ending October 29, 2011 through January 16, 2016.

49. The Nielsen data shows that in 2013 BIG BEN had \$156,714 in sales, and an ACV% distribution of 63%. By 2016 (in a 52 week look-back), sales dropped to \$31,742, and ACV% distribution to 16%. ACV% stands for all-commodity volume and is a standard, well-recognized indicator of market distribution measuring a brands distribution weighted by the size of each store.

50. I am aware that Hansen has very recently developed a frozen pizza variety with the brand names of BREWHAUS and BREW TIME. I understand BREWHAUS is to replace Hansen's failed BIG BEN product, and BREW TIME is intended as a BREW PUB knock-off.

51. Bernatello's saw, for the first time on January 13, 2016, that Hansen actually provided frozen pizzas to grocery stores identified as BREWHAUS pizzas. Attached as

Exhibit O are true and correct copies of photographs of Hansen's BREWHAUS pizzas.

52. In addition to adopting the dominant BREW aspect of Bernatello's mark, Hansen's BREWHAUS frozen pizza is also marketed as a super-premium pizza with estimated retail value of \$10.99 utilizing thickly shredded cheese, premium ingredients, and "bullseye" packaging. The cheese is placed atop the other ingredients.

53. Similar to Bernatello's BREW PUB brand, Hansen's has also utilized a trailer to advertise and serve its BREWHAUS pizza. Attached as **Exhibit P** are true and correct copies of photographs of Hansen's BREWHAUS trailer.

54. I am aware that Hansen's is currently selling BREWHAUS frozen pizzas in Wisconsin and the Upper Peninsula of Michigan. I am also aware that Hansen's BREWHAUS pizzas are being distributed to the following grocery stores which also sell Bernatello's BREW PUB pizza: Woodman's, Festival Foods, Nilssen's in Baldwin, Wisconsin, Marketplace in Hayward and Rice Lake, Wisconsin, and Econo Mart in Spooner, Wisconsin.

55. Hansen uses Cedar Crest, Inc. (main office and distribution center located in Cedarburg, Wisconsin) ("Cedar Crest") to distribute its pizza products. Cedar Crest has a distribution network throughout Wisconsin and the Upper Peninsula of Michigan and to the Minneapolis and St. Paul and other markets in Minnesota, Illinois and Iowa. Cedar Crest distributes pizza products to the same customers as Bernatello's. Hansen's BREWHAUS and BREW TIME products are poised for placement in all of the stores currently carrying BREW PUB pizza.

56. On December 30, 2015, I became aware that Hansen's was also selling a BREW TIME frozen pizza product. Attached as **Exhibit Q** are true and correct copies of photographs of Hansen's BREW TIME pizzas.

57. In addition to adopting the dominant BREW aspect of Bernatello's mark, Hansen's BREW TIME frozen pizza is also marketed as a super-premium pizza with estimated retail value of \$7.99 utilizing thickly shredded cheese, premium ingredients, and "bullseye" packaging. The cheese is placed atop the other ingredients.

58. Like Bernatello's BREW PUB pizza, the label of Hansen's BREW TIME pizza includes what appears to be a keg tap and the statement "contains over 1/2 pound of Real Wisconsin Cheese."

59. I have knowledge that Hansen's BREW TIME pizza program has been sold as a control brand to Cashwise/Coborn's which operates 50+ grocery stores in Minnesota, Wisconsin, North and South Dakota. Cashwise/Coborn is moving forward with carrying BREW TIME frozen pizza in its stores. Bernatello's BREW PUB frozen pizza is also currently sold in all these stores.

60. I have knowledge that Hansen's BREW TIME pizza is also being offered through Topco Associates, LLC ("Topco"). Topco provides procurement, quality assurance, packaging and other services exclusively for its member-owners, which include supermarket retailers, food wholesalers and foodservice companies.

61. Hansen's BREW TIME pizza is distributed through Topco's members and/or member distributors including but not limited to wholesalers and retailers such as Hy-Vee, Affiliated Foods Midwest, and Super Valu. These wholesalers and retailers have a distribution foot print through Minnesota, North Dakota, Iowa, South Dakota, Nebraska, the Upper Peninsula of Michigan, and Wisconsin. Bernatello's distributes its BREW PUB pizza in this same general footprint.

62. Attached as **Exhibit R** is a true and correct copy of a sell sheet (distributed

through Affiliated Foods Midwest) listing the vendor as “TOPCO HANSEN FOODS” and showing the varieties of BREW TIME pizza for sale. The sell sheet also demonstrates the targeting or replacement of Bernatello’s BREW PUB products, stating “The Brew Time brand was developed exclusively for Topco and our members by Hansen Foods (Green Bay, WI) as a private brand solution for what has recently emerged as a very popular & rapidly growing segment with the pizza category- the Brew Pub Style! Per IRI, the leading national brand, Lotza Mozza [sic], is 130% up in sales over the same period last year, and is expected to grow even more in 2016. Like the brand, our Brew Time pizzas claim ½ pound of real cheese and are heavily topped with premium ingredients, The Brew Time brand can offer your customers a more affordable private brand alternative that delivers the same high quality pizza that is just as capable of inducing a cheese coma.” The sell sheet shows the products to be distributed from a warehouse in Kenosha to be shipped March 19, 2016.

63. Distribution through Topco members and/or member distributors will have a major impact on the amount of infringing products entering the market.

64. Hansen’s BREWHAUS and BREW TIME pizzas will be sold in the same stores and geographic areas that Bernatello’s BREW PUB pizza is currently sold.

65. Hansen’s BREWHAUS and BREW TIME pizzas will be competing in the same market as Bernatello’s BREW PUB frozen pizza and targeting the same consumers based on their similar name, price, packaging, and quality and quantity of ingredients.

66. If Hansen’s is permitted to use BREW in connection with its BREWHAUS and BREW TIME frozen pizzas, the brand Bernatello’s has cultivated will be undermined because Bernatello’s has no control over the nature and quality of Hansen’s pizza.

67. If Hansen’s is permitted to use BREW in connection with its BREWHAUS and

BREW TIME frozen pizzas, frozen pizza consumers—who do not “memorize” brands, and who have imperfect memory—will purchase Hansen’s BREWHAUS and BREW TIME pizzas thinking them to be Bernatello’s BREW PUB pizzas owing to the BREW elements in their brands and the similarity to Bernatello’s BREW PUB pizzas, thereby deceiving consumers and diverting Bernatello’s trade.

68. The foregoing is true and correct to the best of my knowledge.

Executed on this 15th day of February, 2016.

s/ Chad D. Schultz
Chad D. Schultz